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No. 95-402

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1995

GKA BEVERAGE CORP., *et al.*,

*Petitioners,*

v.

HAROLD HONICKMAN, *et al.*,

*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

## BRIEF OF RESPONDENT DR PEPPER IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether petitioners, as contractual distributors for the corporate target of an alleged antitrust violation, lack antitrust standing due to the derivative nature of their injuries.

2. Whether petitioners' claims are barred by the doctrine of *res judicata* because petitioners previously litigated the same claims in federal bankruptcy court.

3. Whether the dismissal of petitioners' antitrust claims against respondent DPSU should be sustained because DPSU is not a competitor in the alleged relevant market and thus cannot conspire or attempt to monopolize that market.

4. Whether the Second Circuit properly affirmed the dismissal of petitioners' state law tort claims because they could not allege intent, causation or that DPSU engaged in conduct directed towards petitioners' present or prospective customers.

## RULE 29 DISCLOSURE

DP/SU Acquisition Inc. is the parent company of respondents Dr Pepper/Seven-Up Cos., Inc. and Dr Pepper/Seven-Up Corporation (collectively, "DPSU"). DPSU has no non-wholly owned subsidiaries.

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## SUMMARY

This Court should not review the decision below of the United States Court of Appeals for the Second Circuit, which was a correct and unremarkable interpretation of this Court's antitrust standing principles. The Second Circuit's decision is consistent with both Supreme Court and circuit precedent, and presents no conflict among the lower courts. At bottom, petitioners effectively ask this Court to create a

special exception to well-established standing rules when this case presents neither error nor any issue of particular importance. Moreover, there are alternative bases for sustaining the decision below that would avoid resolution of the questions petitioners present. Accordingly, the petition for a writ of certiorari should be denied.

## COUNTER-STATEMENT OF THE CASE

Respondent DPSU adopts and incorporates by reference the Statement of the Case in respondent Harold Honickman's Brief in Opposition to the Petition for Writ of Certiorari, filed on September 29, 1995.[1]

## REASONS FOR DENYING THE WRIT

Petitioners principally offer three reasons why the Court should grant the petition. First, they contend that the antitrust standing doctrine needs clarification from this Court, which already has addressed the issue five times since 1977. Pet. at 13. Second, they assert that the theoretical issue of whether a potential antitrust plaintiff must be a consumer or competitor to have antitrust standing has "split" the circuits. *Id.* at 14. Finally, they claim that this issue is "important," and thus should not be controlled by the "run of the mill" cases that the court below relied upon. *E.g.*, *id.* at 4, 16.

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[1] To avoid unnecessary duplication of argument with respondent Honickman, whose brief carefully addresses the substantive correctness of the Second Circuit's decision, DPSU presents additional reasons for denying certiorari. Further, consistent with S. Ct. Rule 15, DPSU also wishes to bring a misstatement of fact to the Court's attention. Specifically, petitioners repeatedly assert that DPSU's 7UP brand is the clear market leader in the lemon-lime segment of the soft drink market. *E.g.*, Pet. at 4, 10, 18. This is untrue. Sales of Coke's lemon-lime brand, Sprite, exceed 7UP sales.

As discussed below, none of these contentions are correct, or warrant this Court's review. Petitioners also ignore the district court's holding that petitioners' claims are barred under the doctrine of *res judicata*. That holding, and other basic antitrust law principles, provide alternative bases for sustaining the ruling below that would pretermit consideration of the questions petitioners present to this Court. Finally, petitioners' state law tort claims do not merit this Court's review and, in any event, were properly decided by the courts below.

## I. THE SUPREME COURT HAS PROVIDED AMPLE GUIDANCE ON ANTITRUST STANDING, WHICH THE COURT BELOW CORRECTLY FOLLOWED

Contrary to petitioners' contention, the Supreme Court has spoken in detail on the issue of antitrust standing. As petitioners' own brief points out, in a consistent line of cases from 1977 to 1990, the Supreme Court has set forth with great precision unambiguous principles governing antitrust standing.[2] To have standing to assert an antitrust claim, a plaintiff must allege "antitrust injury," *i.e.*, injury "of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). Indirect or derivative injuries that are merely causally linked in some way to the alleged violation do not constitute "antitrust injury" sufficient to confer standing *Id.* at 487-89; *Associated Gen. Contractors,*

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[2] *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990); *Cargill, Inc. v. Monfort of Col., Inc.*, 479 U.S. 104 (1986); *Associated Gen. Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983); *Blue Shield of Va. v. McCready*, 457 U.S. 465 (1982); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977).

*Inc. v. California State Council of Carpenters,* 459 U.S. 519, 539-41(1983)("*AGC*").

Moreover, it is also well-established that antitrust injury is necessary, but not sufficient, to confer antitrust standing. *Cargill, Inc. v. Monfort of Col., Inc.* 479 U.S. 104, 110 n.5 (1986). If antitrust injury is alleged, there are additional factors that must be met before standing is present. *AGC,* 459 U.S. at 540. Recognizing the difficulty of "announc[ing] a black-letter rule that will dictate the result in every case," the Court affirmatively imposed this multi-factor test to provide guidance to the circuits. *Id.* at 536 nn.33 & 34.

Here, petitioners' injuries ostensibly occurred when they lost their distribution contracts with the Seven-Up Brooklyn Bottling Company ("Brooklyn Bottling"). Respondents' alleged antitrust violation, however, was directed towards Brooklyn Bottling, not petitioners. Pet. App. 12, 14. In this factual context, the lower courts have had little difficulty applying this Court's test for antitrust standing. To the contrary, the lower courts uniformly have held that persons such as petitioners, in a contractual relationship with the target of an alleged antitrust violation, lack "antitrust injury," and thus antitrust standing, because their injuries are derivative in nature. *E.g., Lovett v. General Motors Corp.,* 975 F.2d 518, 521 (8th Cir. 1992); *Sharp v. United Airlines, Inc.*, 967 F.2d 404, 407-08 (10th Cir.), *cert. denied,* 113 S. Ct. 464 (1992); *Southwest Suburban Bd. of Realtors, Inc. v. Beverly Area Planning Ass'n,* 830 F.2d 1374, 1378 (7th Cir. 1987); *Adams v. Pan-American World Airways, Inc.*, 828 F.2d 24, 30-31 (D.C. Cir. 1987), *cert. denied,* 485 U.S. 934 and 485 U.S. 961 (1988); *Eagle v. Star-Kist Foods, Inc.*, 812 F.2d 538, 540-41 (9th Cir. 1987); *A.G.S. Elec., Ltd. v. B.S.R. (USA), Ltd.*, 460

F. Supp. 707, 710-11 (S.D.N.Y.), *aff'd*, 591 F.2d 1329 (2d Cir. 1978).

Given petitioners' allegations, the Second Circuit applied this familiar rule and held that petitioners' derivative injuries were insufficient to confer antitrust standing. Pet. App. 12. Indeed, petitioners do not appear to argue that the Second Circuit erred in applying these well-established principles.[3] Rather, they challenge the Second Circuit's failure to pay what petitioners believe is sufficient homage to the *AGC* factors other than antitrust injury. Pet. at 16. The Second Circuit's approach, however, was wholly correct under *AGC*. As the court below expressly stated, because the issue of antitrust injury was "dispositive" in this case, there was no need to analyze or apply the additional factors in the standing inquiry. Pet. App. 10-11.

In sum, this Court has given ample guidance on antitrust injury and antitrust standing principles, the clarity of which is reflected in the lower courts' consistent application of the derivative injury rule to preclude recovery for indirect injuries like those petitioners allegedly suffered here. Indeed, in *AGC*, the Court spurned a more definitive black letter rule in favor of a case-by-case approach. Thus, not only is clarification unnecessary, but this Court has already determined that it would be undesirable to establish "bright-line" standards for antitrust standing such as petitioners desire.

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[3] Even if they did, this Court reviews for error in the simple application of established law only in cases of exceptional importance. S. Ct. Rule 10.1; *Ross v. Moffit*, 417 U.S. 600, 616-17 (1974).

## II. THERE IS NO CONFLICT AMONG THE CIRCUITS

Petitioners assert that the circuits are "split" over whether a would-be antitrust plaintiff other than a consumer or competitor in the affected market can have antitrust standing. Pet. at 14. Petitioners further assert that the court below "seems" to have limited standing to those two categories of persons and excluded others. *Id.* at 15. Not only have petitioners misstated the Second Circuit's holding, but there is, in fact, complete agreement among the lower courts that derivative injuries are insufficient to confer antitrust standing.

*First,* there is no circuit split on the *only* issue that formed the grounds for the Second Circuit's decision on standing, *i.e.*, whether persons in a contractual relationship with the target of an alleged antitrust violation suffer "antitrust injury." Pet. App. 11-12. To the contrary, as indicated above, the lower courts consistently have held that such derivative injuries do not constitute "antitrust injury." *See supra* at 4; Pet. App. 36 (there is "substantial authority for this proposition"). Petitioners do not provide any authority that even remotely contradicts this axiomatic rule.

*Second,* the purported conflict presented by petitioners -- whether only consumers and competitors can have antitrust standing -- is irrelevant to this case.[4] The court below did not opine on what classes of persons may have standing, much less identify or discuss any possible

[4] Petitioners assert that the Third, Sixth, Ninth and Tenth Circuits confer standing on consumers, competitors, and those whose injuries are "inextricably intertwined" with the injury to competition, while the Seventh and Eighth Circuits purportedly limit recovery to consumers and competitors. Pet. at 14-15.

conflict between the courts in this respect. It merely applied the unambiguous derivative injury rule in a straightforward fashion to deny standing to petitioners. Moreover, even though not pertinent to disposition of the instant case, there is no circuit split even as to the irrelevant issue that the petitioners present.[5]

*Third*, there is no need for the Court to reach out to resolve the alleged "split," even *assuming arguendo* one existed. Under either of the supposedly conflicting circuit tests, petitioners would lack standing based on the facts of this case. As distributors of Brooklyn Bottling, petitioners are neither consumers nor competitors. Nor are their injuries "inextricably intertwined" with Brooklyn Bottling's direct injuries. Rather, as the court below found, petitioners' injuries derivatively flowed from the demise of Brooklyn Bottling; petitioners' distribution contracts were no more the target of the alleged anticompetitive conduct than "Seven-Up Brooklyn's contracts with phone or electric companies." Pet. App. 14. Indeed, even the cases petitioners rely on in support of this supposedly broader "inextricably intertwined" test support the Second Circuit's decision. *E.g., Province v. Cleveland Press Pub. Co.*, 787

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[5] In the two Eighth Circuit cases that petitioners cite, the court merely stated that consumer and competitors "traditionally" and "generally" are the persons who suffer "antitrust injury" as the targets of the alleged anticompetitive practices. *S.D. Collectibles, Inc. v. Plough, Inc.*, 952 F.2d 211, 213 (8th Cir. 1991); *General Indus. Corp. v. Hartz Mountain Corp.*, 810 F.2d 795, 809 (8th Cir. 1987). In the Seventh Circuit case, the court mentioned the consumer/competitor limitation in dicta, but actually held, consistent with the "general rule" applied before *AGC*, that the plaintiff employee did not suffer antitrust injury because he was not the "target" of illegal activity. *In re Indus. Gas Antitrust Litig.*, 681 F.2d 514, 519 (7th Cir. 1982), *cert. denied*, 460 U.S. 1016 (1983). Thus, these circuits have not flatly held that no one other than a consumer or competitor in the relevant market has antitrust standing, as petitioners maintain to create this supposed "split" in the circuits.

F.2d 1047, 1052 (6th Cir. 1986) (denying standing to newspaper employee whose termination was the "tangential by-product" of the newspaper's demise).

## III. THIS COURT SHOULD NOT CREATE A SPECIAL EXCEPTION TO ACCOMMODATE PETITIONERS

At bottom, petitioners effectively ask this Court to craft a special exception to well-established antitrust standing principles that would permit recovery for derivative injuries in some circumstances. Specifically, they claim that they are not "typical distributors" like those in the "run of the mill" cases on which the court below relied, but rather they are "joined at the hip" with Brooklyn Bottling as a "target" in the "New York School of Hard Knocks." Pet. at 4, 10, 11, 21. This case, which falls squarely within the derivative injury rule, does not merit a judicially-crafted exception -- an exception which would only spawn further litigation in an area where the law is well-settled.

Contrary to petitioners' protestations, the facts of this case are indistinguishable from those in the line of cases involving derivative injuries to employees, shareholders, or distributors. Petitioners' contracts, like other contracts, terminated upon the demise of Brooklyn Bottling. Pet. App. 12, 38. Thus, petitioners' injuries -- the loss of their contractual right to sell 7UP brands -- were wholly derivative to the alleged antitrust injury to Brooklyn Bottling. *Id.* To be sure, petitioners belatedly attempt to claim that they were the "target" of an antitrust violation, *e.g.*, Pet. at i, 15, 16, 18, but, as the courts below found, the undisputed facts and their own complaint belie this assertion. Pet. App. 14, 19-20, 38, 70-87 ¶¶ 39, 42, 55,

79, 95, 100, 112. In sum, petitioners' claimed injuries, however unfortunate, do not merit a potential recovery any more than other similarly-situated plaintiffs who consistently have been denied antitrust standing.

Further, as this Court stated in *AGC*, without a prohibition for recovery for indirect injuries, this Court's "strong interest. . . . in keeping the scope of complex antitrust trials within judicially manageable limits" would be undermined. *AGC*, 459 U.S. at 543. Similarly, the entire body of law pertaining to the derivative injury rule would be vitiated and replaced with the prospect of endless litigation over the scope and application of a newly-created special exception. In short, petitioners simply seek to have the Court make unclear what heretofore has been perfectly clear, *i.e.*, derivative injuries do not constitute "antitrust injury" sufficient to confer standing.

## IV. THE DECISION CAN BE SUSTAINED ON ALTERNATIVE GROUNDS, WHICH WOULD PRETERMIT CONSIDERATION OF THE QUESTIONS PETITIONERS RAISE

The federal antitrust claims against DPSU can be dismissed on two alternative bases that would obviate any need for the Court to reach the questions that petitioners present. First, as discussed in respondent Honickman's brief, the district court properly dismissed petitioners' claims on *res judicata* grounds. Second, the dismissal of petitioners' antitrust claims against DPSU can be sustained on the grounds that DPSU, as a non-participant in the alleged relevant market (soft drink bottling and distribution), cannot -- by definition -- conspire or attempt

to monopolize that market.[6] *E.g.*, *Spectrum Sports, Inc. v. McQuillan*, 113 S. Ct. 884, 890-91 (1993); *Genetic Sys. Corp. v. Abbott Lab., Inc.*, 691 F. Supp. 407, 420 (D.D.C. 1988). These alternative bases of decision provide independent sound reasons for denying the petition.

## V. THE COURT BELOW PROPERLY DISMISSED THE STATE LAW TORT CLAIMS, WHICH, STANDING ALONE, ARE NOT A PROPER SUBJECT OF THIS COURT'S REVIEW

The Second Circuit also affirmed the dismissal of petitioners' state law claims, which petitioners ask this Court to review because they are "so closely related to the antitrust issues." Pet. at 25. Given that petitioners' federal antitrust claims are non-viable, the state law issues -- which consist primarily of garden variety tort claims for which there is not even an alleged conflict between the Second Circuit's ruling and any prior state court rulings -- should not be reviewed either.[7] Because the tort claims present no substantive federal questions, they are more appropriately addressed by the lower courts rather than this Court. *E.g.*, *Haring v. Prosise*, 462 U.S. 306, 314 n.8 (1983)("standing alone, a challenge to state-law determinations by the court of appeals will rarely constitute an appropriate subject of this Court's review"); *Butner v. United States*, 440 U.S. 48, 58 (1979)(declining to address state law issues, which are better left to "federal judges who deal regularly with

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[6] DPSU is a manufacturer of soft drink concentrate, and does not sell or distribute carbonated soft drinks. Pet. App. 5.

[7] Petitioners state law antitrust claim fails for the same reasons as the federal antitrust claims. *See* Pet. App. 10-12.

questions of state law in their respective districts and circuits").

In any event, for the reasons set forth in detail in respondent Honickman's brief and by the courts below, petitioners' state law tort claims were properly dismissed. DPSU adopts and incorporates by reference these arguments concerning petitioners' state law claims. In short, because petitioners' injuries were derivative to Brooklyn Bottling's alleged injury, petitioners could not establish that they were the intended target of any alleged tortious behavior, that respondents conduct caused any of petitioners' alleged injuries or that respondents even approached petitioners' retail customers as is required to state a claim under New York law. *See* Pet. App. 14; *Volvo N. Am. Corp. v. Men's Int'l Professional Tennis Council*, 857 F.2d 55, 74 (2d Cir. 1988).

## CONCLUSION

For all the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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